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Case No.: 2:18-cv-02342-APG-VCF

**Order (1) Granting Defendant’s Motion to
Dismiss in Part and (2) Overruling
Plaintiff’s Objection**

[ECF Nos. 9, 28]

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1 “FYROSITY” to mislead potential customers to Groupon affiliates and that the state law claims
2 are sufficiently pleaded.

3 After Magistrate Judge Ferenbach granted limited discovery pending resolution of the
4 motion to dismiss, LV Skydiving filed a motion for sanctions. Magistrate Judge Ferenbach
5 denied that motion. LV Skydiving objects to that decision. I grant Groupon’s motion to dismiss
6 in part and I overrule LV Skydiving’s objection to Magistrate Judge Ferenbach’s order.

7 **I. BACKGROUND¹**

8 LV Skydiving “offers services to individuals who wish to have the experience of jumping
9 out of an airplane while tethered to an experienced parachutist.” ECF No. 1 at 3. It offers such
10 services in southern Nevada using the registered mark “FYROSITY.” *Id.* Groupon provides
11 “discount certificates that Groupon’s customers may use with businesses that maintain a
12 relationship with Groupon to help enable Groupon to provide” skydiving services. *Id.* LV
13 Skydiving alleges that Groupon controls the southern Nevada skydiving services market by
14 aggressively recruiting businesses to become affiliates and then setting skydiving services at
15 “deeply discounted” prices, which harms LV Skydiving’s business. *Id.* at 3-4.

16 LV Skydiving also alleges that Groupon uses LV Skydiving’s name and registered mark
17 in its website metadata without permission and engages in such infringement to divert customers
18 looking for skydiving services to Groupon’s site. *Id.* at 4. It alleges that consumers using LV
19 Skydiving’s mark as a search term in a general internet search are diverted to Groupon. *Id.* And
20 it alleges that Groupon’s website is constructed in a way so that consumers can search
21 specifically for LV Skydiving’s mark and be misled into finding information on Groupon
22 affiliates. *Id.* For example, LV Skydiving points to a Facebook post by Groupon that provides a
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¹ These facts are a summary of LV Skydiving’s allegations in its complaint. *See* ECF No. 1.

1 link to search results on Groupon’s website for “skydive Fyrosity.” *Id.* at 5. LV Skydiving
2 alleges that the link to the search results is intended to obfuscate the fact that the advertised
3 services are by Groupon affiliates and not LV Skydiving. *Id.* It also alleges that as a result of
4 Groupon’s behavior, it has lost potential clients and suffered economic harm. *Id.* at 5-6.

5 LV Skydiving asserts five causes of action: 1) monopolization under 15 U.S.C. § 2
6 (Pricing); 2) monopolization under 15 U.S.C. § 2 (intellectual property misuse); 3) registered
7 trademark infringement under 15 U.S.C. § 1114(a)(1); 4) misappropriation of commercial
8 properties under Nevada common law; and 5) unjust enrichment under Nevada common law. *Id.*
9 at 6-9.

10 **II. ANALYSIS**

11 In considering a motion to dismiss, “all well-pleaded allegations of material fact are taken
12 as true and construed in a light most favorable to the non-moving party.” *Wyler Summit P’ship v.*
13 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, I do not assume the truth
14 of legal conclusions merely because they are cast in the form of factual allegations. *See Clegg v.*
15 *Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). A plaintiff must make sufficient
16 factual allegations to establish a plausible entitlement to relief. *Bell Atl. Corp. v. Twombly*, 550
17 U.S. 544, 556 (2007). Such allegations must amount to “more than labels and conclusions, [or] a
18 formulaic recitation of the elements of a cause of action.” *Id.* at 555.

19 A. Monopolization Under 15 U.S.C. § 2

20 Section 2 of the Sherman Act prohibits persons from monopolizing, or attempting to
21 monopolize, “any part of the trade or commerce among the several States, or with foreign
22 nations.” 15 U.S.C. § 2. “There are three essential elements to a successful claim of Section 2
23 monopolization: (a) the possession of monopoly power in the relevant market; (b) the willful

1 acquisition or maintenance of that power; and (c) causal antitrust injury.” *Name.Space, Inc. v.*
2 *Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1131 (9th Cir. 2015) (citation
3 omitted).

4 Only those who meet the requirements for antitrust standing may pursue an antitrust
5 claim. *Glen Holly Entm’t, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 371 (9th Cir. 2003). Antitrust
6 standing requires the plaintiff to adequately allege antitrust injury. *Id.* Antitrust injury is “injury
7 of the type the antitrust laws were intended to prevent and that flows from that which makes
8 defendants’ acts unlawful.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489
9 (1977). “A plaintiff who is neither a competitor nor a consumer in the relevant market does not
10 suffer antitrust injury.” *Vinci v. Waste Mgmt., Inc.*, 80 F.3d 1372, 1376 (9th Cir. 1996) (quotation
11 and citation omitted). It is not enough that two firms compete; rather they must compete in the
12 market in which trade was restrained. *Exhibitors’ Serv., Inc. v. Am. Multi-Cinema, Inc.*, 788 F.2d
13 574, 579 (9th Cir. 1986).

14 In analyzing whether the plaintiff and defendant participate in the same market, I look to
15 the “reasonable interchangeability of use or the cross-elasticity of demand between the services
16 provided by [Groupon] and by [LV Skydiving].” *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467,
17 1471 (9th Cir. 1985); *see also Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d
18 1264, 1271 (9th Cir. 1975) (“[W]here there is a high degree of substitutability in the use of two
19 commodities, it may be said that the cross-elasticity of demand between them is relatively high,
20 and therefore the two should be considered in the same market.”). In *Bhan*, the Ninth Circuit
21 found that nurse anesthetists and M.D. anesthesiologists competed in the same market because
22 the services provided were reasonably interchangeable in that nurse anesthetists “still duplicate
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1 many of the services provided by an M.D. anesthesiologist” despite requiring the supervision of
2 a physician to conduct such services. 772 F.2d at 1471.

3 LV Skydiving states that it offers tandem skydiving services to customers in southern
4 Nevada. It alleges that Groupon provides discount certificates to customers to use at businesses
5 affiliated with Groupon that provide skydiving services in southern Nevada. The relevant market
6 consists of “businesses that sell[] the Relevant Services to residents of and visitors to southern
7 Nevada who wish to have the experience of jumping out of an airplane while tethered to an
8 experienced parachutist.” *See* ECF No. 1 at 3.

9 However, LV Skydiving has not plausibly alleged that Groupon provides services that are
10 interchangeable with other tandem skydiving service providers as required to be part of the same
11 market. This is unlike the situation in *Bhan* where the services provided were interchangeable.
12 Providing discount certificates to customers seeking tandem skydiving services is different (and
13 a separate market) from providing tandem skydiving services. Tandem skydiving businesses in
14 southern Nevada that allow Groupon to advertise their discounts compete in the same market as
15 LV Skydiving. Because LV Skydiving and Groupon are not competitors in the allegedly
16 restrained market, Groupon has not caused LV Skydiving antitrust injury under the Sherman Act.
17 Consequently, I dismiss LV Skydiving’s first and second causes of action with prejudice.

18 B. Registered Mark Infringement Under 15 U.S.C. § 1114(a)(1)

19 “To prevail on a claim of trademark infringement under the Lanham Act, 15 U.S.C.
20 § 1114, a party must prove: (1) that it has a protectible ownership interest in the mark; and (2)
21 that the defendant’s use of the mark is likely to cause consumer confusion.” *Network*
22 *Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011)
23 (quotation and citation omitted). This may include an initial interest confusion theory of

1 trademark infringement, where a customer has an initial interest in a competitor's product
2 because the competitor misuses another's mark. *See Playboy Enters., Inc. v. Netscape Commc'ns*
3 *Corp.*, 354 F.3d 1020, 1025 (9th Cir. 2004). In determining the likelihood of confusion, courts
4 look to eight non-exhaustive factors: "[1] strength of the mark; [2] proximity of the goods; [3]
5 similarity of the marks; [4] evidence of actual confusion; [5] marketing channels used; [6] type
6 of goods and the degree of care likely to be exercised by the purchaser; [7] defendant's intent in
7 selecting the mark; and [8] likelihood of expansion of the product lines." *Id.* at 1145.

8 In cases involving internet search engines, courts also look to the "labeling and
9 appearance of the advertisements and the surrounding context on the screen displaying the
10 results page." *Multi Time Mach., Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 936 (9th Cir. 2015)
11 (citation omitted). However, not every factor must be considered. *See id.* at 937. "The test for
12 likelihood of confusion is whether a reasonably prudent consumer in the marketplace is likely to
13 be confused as to the origin of the good or service bearing one of the marks." *Id.* at 935.

14 LV Skydiving has a federally registered trademark. ECF No. 1-1 at 2-3. LV Skydiving
15 alleges that Groupon willfully uses the mark in its metadata without consent "in connection with
16 the sale, offering for sale, distribution, and advertising of services." ECF No.1 at 7-8. It alleges
17 that Groupon uses the mark in its metadata to divert customers to other businesses affiliated with
18 Groupon that provide skydiving services in southern Nevada. *Id.* at 4. It alleges that this
19 diversion will likely cause confusion to consumers who seek LV Skydiving services, but instead
20 are directed to Groupon's site. *See* ECF No. 1 at 4-5, 7-8.

21 Taking LV Skydiving's allegations as true, LV Skydiving has plausibly alleged Groupon
22 used LV Skydiving's protected mark in its metadata to cause initial interest confusion by
23 directing potential customers to offers to buy a skydiving service from other businesses

1 associated with Groupon.² While Groupon argues that any alleged metadata infringement would
2 not be indexed by search engines to influence results and would not cause likely confusion, that
3 involves issues of fact outside the complaint's allegations. I therefore deny Groupon's motion to
4 dismiss LV Skydiving's third cause of action for trademark infringement.

5 C. State Law Claims

6 *1. Misappropriation of Commercial Properties*

7 LV Skydiving asserts a claim for misappropriation of commercial properties under
8 Nevada common law. Groupon moves to dismiss this claim, arguing that it is not a recognized
9 cause of action under state or federal law. Alternatively, Groupon argues that LV Skydiving's
10 allegations are vague and insufficient to support a separate basis for liability as they are
11 duplicative of its trademark infringement claim. LV Skydiving responds that this court has
12 recognized the claim for misappropriation of commercial properties in at least one published
13 decision and multiple unpublished decisions. In its reply, Groupon argues that the law already
14 provides a clear remedy for trademark infringement (the alleged misappropriation), so LV
15 Skydiving cannot seek a separate form of relief.

16 Nevada has not yet recognized a claim for misappropriation of commercial properties.
17 However, for the purpose of this motion, I follow other decisions of this court that have
18 suggested that the Supreme Court of Nevada would recognize such a claim. *See, e.g. Salestraq*

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20 ² Part of LV Skydiving's claim alleges that Groupon posted a predatory link on Facebook that
21 opened to a Groupon page with "skydive Fyrosity" in the search results. ECF No. 1 at 5. LV
22 Skydiving alleges Groupon posted this link to confuse consumers and divert potential customers
23 to Groupon affiliates. To the extent that LV Skydiving agrees with Groupon's depiction of the
link in its motion to dismiss (ECF No. 9-1 at 8), I note that recent Ninth Circuit case law has held
that where a "search results page clearly labels the name and manufacturer of each product
offered for sale and even includes photographs of the items, no reasonably prudent consumer
accustomed to shopping online would likely be confused as to the source of the products." *Multi
Time Mach., Inc.*, 804 F.3d at 933.

1 *Am., LLC v. Zyskowski*, No. 2:08-cv-01368-LRH-LRL, 2009 WL 1652170, at *3 (D. Nev. June
2 10, 2009), *aff'd*, 334 F. App'x 125 (9th Cir. 2009) (noting that Nevada recognizes claims closely
3 related to commercial misappropriation and that California, which Nevada has followed when
4 recognizing new commercial tort theories, recognizes a claim for misappropriation of non-trade-
5 secret information).

6 Neither party has laid out the elements of a claim for misappropriation of commercial
7 properties. Under California law, a plaintiff must show that “(a) the plaintiff invested substantial
8 time, skill or money in developing its property; (b) the defendant appropriated and used the
9 plaintiff’s property at little or no cost to the defendant; (c) the defendant’s appropriation and use
10 of the plaintiff’s property was without the authorization or consent of the plaintiff; and (d) the
11 plaintiff can establish that it has been injured by the defendant’s conduct.” *Id.*

12 Here, LV Skydiving has plausibly alleged it has a claim for misappropriation of
13 commercial properties, the elements of which would be different from a trademark infringement
14 claim. LV Skydiving spent time and money registering its mark. LV Skydiving alleges that
15 Groupon used the mark without permission and that such use has injured LV Skydiving in the
16 form of lost profits by diverting customers to competitors.

17 Because LV Skydiving has plausibly alleged a misappropriation of commercial properties
18 claim, I deny Groupon’s motion to dismiss this cause of action. As the case develops, LV
19 Skydiving will have to sufficiently present the legal support and the elements of a
20 misappropriation of commercial properties claim to ensure the claim moves forward.

21 *2. Unjust Enrichment*

22 LV Skydiving’s fifth cause of action alleges unjust enrichment under Nevada common
23 law. Groupon moves to dismiss this claim, arguing that LV Skydiving fails to demonstrate any

1 benefit conferred on Groupon by allegedly using the “FYROSITY” mark or how such a benefit
2 would be unjust. It also argues that LV Skydiving recites the elements of the claim, without
3 more, and the allegations are duplicative of the trademark infringement claim. LV Skydiving
4 responds that it has plausibly alleged that Groupon uses its registered mark without permission,
5 and that such use has benefited Groupon at LV Skydiving’s expense. LV Skydiving also
6 contends that its allegations are not duplicative of the trademark infringement claim, but even if
7 they are, LV Skydiving can plead in the alternative under Federal rule of Civil Procedure 8(d)(2)
8 and (3).

9 “Unjust enrichment occurs when one party confers a benefit on a second party which
10 accepts and retains the benefit under circumstances such that it would be inequitable to retain the
11 benefit without paying for its value.” *Sierra Dev. Co. v. Chartwell Advisory Grp., Ltd.*, 223 F.
12 Supp. 3d 1098, 1107 (D. Nev. 2016) (citing *Certified Fire Prot. Inc. v. Precision Constr.*, 283
13 P.3d 250, 257 (Nev. 2012)). “The doctrine of unjust enrichment or recovery in quasi contract
14 applies to situations where there is no legal contract but where the person sought to be charged is
15 in possession of money or property which in good conscience and justice he should not retain but
16 should deliver to another or should pay for.” *Id.* (citation omitted).

17 Here, LV Skydiving has plausibly alleged it has a claim for unjust enrichment, the
18 elements of which are different from a trademark infringement claim. LV Skydiving alleges that
19 Groupon uses its registered mark without permission. It also alleges that such use has diverted
20 potential LV Skydiving customers to Groupon affiliates that provide skydiving services. Thus,
21 Groupon has benefitted from using LV Skydiving’s mark. I deny Groupon’s motion to dismiss
22 LV Skydiving’s fifth cause of action.

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1 D. LV Skydiving’s Objection to Magistrate Judge Ferenbach’s Denial of Sanctions

2 LV Skydiving filed a motion for spoliation sanctions, arguing that Groupon was non-
3 compliant with discovery proceedings and either destroyed or failed to preserve evidence that
4 Groupon used the “FYROSITY” mark in its metadata. *See* ECF No. 23. To support this claim,
5 LV Skydiving relied on an expert, who concluded that the mark must have existed or did exist in
6 Groupon’s metadata. *Id.* Groupon argues in response that it does not use the mark in its website
7 metadata and that LV Skydiving misunderstands the difference between a static website, where
8 the code and metadata is pre-written, and a dynamic website, where the code and metadata
9 changes depending on user input. *See* ECF No. 24. It argues that LV Skydiving failed to satisfy
10 the elements of spoliation, and even if spoliation occurred sanctions would not be the appropriate
11 remedy. *Id.*

12 Magistrate Judge Ferenbach heard LV Skydiving’s motion for sanctions on August 19,
13 2019 and denied the motion as unripe, noting that LV Skydiving’s motion was based on an
14 expert report when discovery was largely stayed. ECF No.27. LV Skydiving objects to this
15 decision, arguing that it conclusively established spoliation. ECF No. 28 at 3-4. It then asserts I
16 should deny the motion to dismiss due to Groupon’s spoliation. *Id.* at 4. Groupon responds that
17 LV Skydiving fails to demonstrate that Magistrate Judge Ferenbach’s order was “clearly
18 erroneous,” spoliation was not conclusively established, and sanctions would not be the
19 appropriate remedy even if it was established. ECF No. 29 at 7-10. Groupon also seeks
20 sanctions, arguing that LV Skydiving failed to comply with local rules and filed an unwarranted
21 motion. *Id.* at 11.

22 I review a magistrate judge’s order in a pretrial matter under a “clearly erroneous or
23 contrary to law” standard. 28 U.S.C. § 636(b)(1)(A); LR IB 1–3. A finding “is clearly erroneous

1 when, although there is evidence to support it, the reviewing court on the entire evidence is left
2 with the definite and firm conviction that a mistake has been committed.” *United States v. Ruiz-*
3 *Gaxiola*, 623 F.3d 684, 693 (9th Cir. 2010). “An order is contrary to law when it fails to apply
4 or misapplies relevant statutes, case law, or rules of procedure.” *United States v. Desage*, 229
5 F.Supp.3d 1209, 1213 (D. Nev. 2017). I may affirm, reverse, or modify the magistrate judge’s
6 order and may also remand the matter to the magistrate judge with instructions. L.R. IB 3–1(b).

7 Magistrate Judge Ferenbach’s order denying the sanctions motion was not clearly
8 erroneous. Magistrate Judge Ferenbach determined that the motion for sanctions was unripe
9 because LV Skydiving filed a spoliation motion and introduced expert evidence when discovery
10 was stayed except for limited discovery on only two issues: (1) “who sets the prices that appear
11 on Groupon’s website” and (2) “written discovery and/or [] a 30(b)(6) deposition regarding any
12 use of LV Skydiving’s mark in Groupon’s website metadata.” *See* ECF No. 19 at 8.³ I agree
13 with this analysis. Additionally, because LV Skydiving’s trademark infringement claim survives
14 the motion to dismiss, discovery will continue and the parties can further explore whether LV
15 Skydiving’s “FYROSITY” mark is used in Groupon’s metadata. Thus, I overrule LV
16 Skydiving’s objection to Magistrate Judge Ferenbach’s order denying sanctions.

17 I THEREFORE ORDER that defendant Groupon, Inc.’s motion to dismiss (**ECF No. 9**)
18 is **GRANTED IN PART**. I dismiss LV Skydiving’s first and second causes of action with
19 prejudice.

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22 ³ Groupon requests sanctions under Local Rules IA 11-8 and IA 1-3. But Groupon provided no
23 authority for its claim that sanctions should be granted for failing to meet and confer prior to
filing a spoliation sanctions motion. As to LV Skydiving’s purported violation of the partial
discovery stay, I follow Magistrate Judge Ferenbach’s decision to deny sanctions on that basis.
ECF No. 27. I therefore deny Groupon’s request for sanctions.

1 I FURTHER ORDER that plaintiff Las Vegas Skydiving Adventures LLC's objection to
2 Magistrate Judge Ferenbach's order denying sanctions (**ECF No. 28**) is **OVERRULED**.

3 DATED this 23 of October, 2019.

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6 ANDREW P. GORDON
7 UNITED STATES DISTRICT JUDGE
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